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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

IRA LEE KURNEY et al.,

Defendants and Appellants.

B210343

(Los Angeles County  
Super. Ct. No. NA075048)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Tomson T. Ong, Judge. Modified and affirmed with direction.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and  
Appellant Ira Lee Kurney.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant  
and Appellant Sterling Kijafa Blanche.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D.  
Matthews, Supervising Deputy Attorney General, Shawn McGahey Webb, Deputy  
Attorney General, for Plaintiff and Respondent.

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A jury convicted Ira Lee Kurney and Sterling Kijafa Blanche on multiple counts in connection with two armed robberies. Kurney and Blanche appeal, arguing that sentencing enhancements were incorrectly imposed and that their sentences were incorrectly calculated. They also argue that substantial evidence did not support the imposition of separate punishments for assault and false imprisonment. We agree with Kurney and Blanche that several sentencing enhancements must be stricken, and that the imposition of separate sentences for assault with a firearm and false imprisonment was not supported by substantial evidence. We order the sentences corrected.

### **BACKGROUND**

Count 1 of an 11 count information filed October 11, 2007, charged Kurney, Blanche, and codefendant Victor Antonio Bee<sup>1</sup> with the second degree robbery of Uriel Lopez, in violation of Penal Code section 211.<sup>2</sup> Blanche was also charged with inflicting great bodily injury on Lopez under section 12022.7, subdivision (a). Count 2 charged Kurney, Blanche and Bee with kidnapping Lopez to commit robbery, in violation of section 209, subdivision (b)(1). Counts 3 and 4 charged Kurney and Blanche with assault with a firearm on John and Jane Doe, in violation of section 245 subdivision (a)(2), and with personal use of a firearm during the commission of the offense under section 12022.5. Counts 5 and 6 charged Kurney, Blanche and Bee with false imprisonment by violence of John and Jane Doe, in violation of section 236. Count 7 charged Kurney with possession of methamphetamine, in violation of Health and Safety Code section 11377, subdivision (a).

The information also alleged that a principal to the offenses described in counts 1 through 7 was armed with a firearm, in violation of section 12022, subdivision (a)(1). As to counts 3 and 4, the information alleged that Kurney and Blanche personally used a firearm within the meaning of section 12022.5, subdivisions (a) and (d).

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<sup>1</sup> Bee is not a party to this appeal.

<sup>2</sup> Unless otherwise indicated, all subsequent statutory references are to the Penal Code.

Counts 8 through 11 charged Kurney with the robberies of Ramiro Solano, Alan Jeffrey Luntz, Carlos Garcia, and Eduardo Martinez, in violation of section 211.

As to all counts, the information alleged that Kurney and Blanche each personally used a firearm, within the meaning of section 12022.53, subdivision (b).

The information alleged that Kurney had suffered one prior strike conviction as to all counts, and Blanche had suffered four as to counts 1 through 6, under sections 667, subdivisions (b)–(i) and 1170.12, subdivisions (a)–(d). The information also alleged as to counts 1–6 that Blanche’s prior convictions were serious felonies for which he had served prison terms, under sections 667, subdivision (a)(1), and 667.5, subdivision (b).

Kurney and Blanche pleaded not guilty and denied the special allegations. The court granted the prosecution’s motion to dismiss counts 2 (kidnapping) and 7 (possession of methamphetamine), and also granted the defense motion to bifurcate trial on the priors allegations.

The jury found Kurney and Blanche guilty and found the weapons allegations true. Blanche admitted the priors allegations.

Kurney was sentenced to 40 years and 4 months in state prison, with all terms to run consecutively to one another as well as to a sentence in a separately tried case. Kurney received presentence custody credit.

Blanche was sentenced to state prison for a total term of 149 years and 8 months to life, with all terms to run consecutively, with presentence custody credit.

Kurney and Blanche filed timely notices of appeal.

## **FACTS**

At trial, the prosecution presented evidence that Kurney participated in two robberies, and that Blanche and Kurney were accomplices in the second robbery.

### **I. June 19, 2007—Affordable Furniture Robbery (Kurney)**

On June 19, 2007, at about 1:30 p.m., Solano, Luntz, Garcia and Martinez were working at the Affordable Furniture store in Long Beach when three men entered the

store. One of the men was Kurney,<sup>3</sup> wearing a hooded sweatshirt and carrying a gun. Kurney put the gun into Solano's face and demanded that Solano place money from the register onto the counter. After Solano complied, one of the other men took the cash and Solano's cell phone off the counter. At Kurney's demand, Solano also gave Kurney the money he had in his wallet.

Kurney then demanded the money from Martinez's pocket, Martinez complied, and the two other men took money from the pockets of Luntz and Garcia. At Kurney's demand, Solano opened the outer safe at gunpoint, but there was no money in the outer safe. Someone at the front of the store whistled, and Kurney and the two other men left. A videotape of the robbery was shown at trial. About \$1,620 was taken in the robbery.

## **II. July 20, 2007—Hot Box robbery (Kurney and Blanche)**

On July 20, 2007, at about 2:30 p.m., Lopez was working at the Hot Box, the smoke shop he owned in Long Beach. Two customers, John and Jane Doe, were in the store. Two men entered the store, one jumped the counter, and Lopez went to the floor with a gun in his face. The man who had jumped the counter was telling Lopez they wanted the money. One of the men hit Lopez with the gun, and they pushed him to the cash register and demanded that he open it. He complied and they grabbed the money inside, about \$80 to \$100. They then took Lopez to the back room at gunpoint, demanding more money, and he gave them the \$2,800 he had in a box. The men ran when Lopez heard someone say "Cops," taking the money and Lopez's cell phone. Lopez was taken to the hospital, where he received nine staples for his head injury. He could not remember the faces of the robbers.

Long Beach police apprehended Kurney hiding under a truck parked on the street. He had a loaded gun and a wad of cash in his pockets. Blanche was arrested hiding downstairs in a nearby house, where police recovered a loaded gun and a cell phone.

The surveillance video was shown at the trial. The video showed Kurney, Blanche and a third man enter the store. Kurney jumped the sales counter and pointed his gun at

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<sup>3</sup> Solano identified Kurney as the robber who held the gun on him in a six-pack photo lineup on July 19, 2007, at the preliminary hearing, and in the courtroom.

Lopez. Blanche walked to the front door. The third man stopped Jane Doe from leaving the store, and pushed her to the floor. John Doe was on the floor next to Jane Doe. While the third man closed the front door, Blanche walked to the sales counter, pointing his gun at the Does as he passed them. Blanche jumped the sales counter to join Lopez. The accomplice remained standing between the Does and the front door. Blanche hit Lopez in the head with the gun.

## **ANALYSIS**

### **I. The 16-month terms imposed on Kurney and Blanche under section 12022.5 on count 3 must be stricken.**

Kurney and Blanche received 16-month terms on count 3 pursuant to section 12022.5, subdivisions (a) and (d), which provides a sentence enhancement for any personal use of a firearm during a violation of section 245 (assault with a firearm). Kurney and Blanche argue, and the prosecution concedes, that the section 12022.5, subdivisions (a) and (d) enhancement imposed on count 3 (assault with a firearm on Jane and John Doe in connection with the Hot Box robbery) must be stricken. The information alleged a section 12022.5, subdivision (a) and (d) enhancement against both Kurney and Blanche in connection with count 3. The verdict forms for count 3, however, did not ask the jury to make a finding pursuant to that section, and neither Kurney nor Blanche admitted the allegation. “All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant or found to be true by the trier of fact.” (Penal Code, § 1170, subd. (e); see *People v. Najera* (1972) 8 Cal.3d 504, 506–507, disapproved on other grounds in *People v. Wiley* (1995) 9 Cal.4th 580, 588 [gun use enhancement must be found by jury, not judge].) Because the jury did not find, and Kurney and Blanche did not admit, that they personally used a firearm as to count 3 under section 12022.5, the 16-month terms imposed on count 3 must be stricken.

### **II. The jury’s true finding regarding section 12022.53, subdivision (b) on count 3 as to Kurney and Blanche must also be stricken.**

The jury found true a section 12022.53, subdivision (b) enhancement on count 3 as to both Kurney and Blanche, and the minute order of the sentencing hearing reflects that

a term was imposed on Kurney under that section. Kurney points out that section 12022.53, subdivision (b) provides a sentencing enhancement for persons convicted of enumerated felonies who use firearm in commission of the crime, but section 245, subdivision (a)(2), the felony alleged against Kurney and Blanche in count 3, is not among the enumerated felonies in section 12022.53, subdivisions (a) and (d). The prosecution concedes that the true finding on count 3 as to section 12022.53, subdivision (b), and the reference to a term imposed pursuant to section 12022.53, subdivision (b) in the minute order, must therefore be stricken as to Kurney. Blanche did not receive a sentence enhancement under section 12022.53, subdivision (b) , but we strike the true finding as to Blanche as well.

### **III. Kurney was properly subject to a section 12022.5 firearm enhancement on counts 3 and 4.**

Kurney's sentence on count 3 (assault with a firearm on John Doe) and count 4 (assault with a firearm on Jane Doe), both of which charged violations of section 245, subdivision (a)(2), were each subject to a 16-month sentence enhancement under section 12022.5, subdivisions (a) and (d). Section 12022.5, subdivision (a) provides "any person who personally uses a firearm in the commission of a felony . . . shall be punished by an additional and consecutive term of imprisonment in the state prison . . . ." (See § 12022.5, subdivision (d) ["the additional term provided by this section shall be imposed for any violation of Section 245 if a firearm is used"].) The sole evidence on counts 3 and 4, the Hot Box videotape, shows that Kurney was behind the counter with Lopez, the store owner, when Blanche pointed his gun at the Does as he walked to the counter at the back of the store. Kurney argues that the jury was improperly instructed that vicarious liability was a basis for a true finding on a personal firearm use allegation. He contends that his sentence on counts 3 and 4 was not properly subject to enhancement for personal firearm use in the assaults on the Does, because he did not point his gun at the Does but was instead busy using his gun behind the counter to rob Lopez.

Kurney's argument is that because he was only vicariously liable for the assault with a firearm on John and Jane Doe, his sentence could not be enhanced on the ground

that he personally used a firearm in the commission of the crime. This argument has been roundly rejected. *In re Antonio R.* (1990) 226 Cal.App.3d 476, the defendant shot his gun into a crowd, and someone in the crowd fired back, killing one of the defendant's companions. The defendant was convicted of murder, and his sentence was enhanced by two years under section 12022.5. He challenged the enhancement because he did not personally commit the murder. "As he was found guilty of murder on the theory of vicarious liability, appellant reasons, he is not subject to the enhancement, even if he personally used a firearm while the killing was being committed." (*Id.* at p. 479.) The court rejected this argument, because the defendant had personally used a firearm: "The obvious purpose of section 12022.5 is to discourage the use of firearms in criminal activity. Had the Legislature meant to exclude from its provisions one who is only vicariously liable, it could easily have done so. . . . As we read the statute, one who commits an act which renders him criminally liable, whether directly or vicariously, is subject to the section 12022.5 enhancement if he personally uses a firearm during that act." (*Ibid.*)

Here, Kurney challenges the imposition of the enhancement because he did not personally commit the assault with a firearm on John and Jane Doe. Like the defendant in *Antonio R.*, however, Kurney personally used a firearm to commit an act (the robbery) which made him vicariously liable for the assault with a firearm on John and Jane Doe; he was therefore properly subject to the enhancement. (See *People v. Berry* (1993) 17 Cal.App.4th 332, 335–339 [listing cases supporting imposition of section 12022.5 enhancement when each defendant holds a gun in a series of joint offenses and enhancement is added for crime one defendant aided or abetted].) Kurney was armed and actively using his gun to rob Lopez. He was vicariously liable for the actions of Blanche, his codefendant, and "[t]here being no question that appellant personally used a firearm during the course of the instant robbery, the enhancement was entirely proper regardless of whether or not he also personally [used his gun on] the victim[s]." (*Id.* at p. 337.)

Kurney cites *People v. Nguyen* (1988) 204 Cal.App.3d 181, 194, in which the Fourth Appellate District held "the evidence supports a finding of Nguyen's use of a

firearm during the robbery but not the attempted murder” where Nguyen’s accomplice, not Nguyen, shot the victim during a robbery (Nguyen was also armed). The Supreme Court subsequently held, however, in *People v. Walker* (1988) 47 Cal.3d 605, 634–635, that a defendant who displayed a gun during a robbery was subject to an enhancement for personal use of a gun in the commission of murder as well as robbery, although no witnesses observed who fired the shots, and the defendant had handed the gun to his accomplice some time earlier. Rejecting the defendant’s contention that the jury should have been instructed that the gun-use allegation could be found true only if “defendant *used* the gun to commit the murder, and that his earlier display or use of the gun in the commission of a ‘separate’ felony (robbery) would be insufficient to support such a finding,” the court noted: “Section 12022.5 is intended to distinguish those who are willing to use firearms while committing felonies from those who are not, and to increase the penalty for the former.” (*Id.* at p. 635.) “By implication, the California supreme court has rejected the reasoning of *Nguyen* . . . .” (*Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 458, fn. 6.)

There was no instructional error.

#### **IV. Kurney and Blanche’s sentences for false imprisonment must be stayed pursuant to section 654.**

Kurney and Blanche argue that their sentences for false imprisonment (counts 5 [John Doe] and 6 [Jane Doe]) must be stayed pursuant to section 654, because the assault with a firearm and false imprisonment charges arose from a single course of conduct. Section 654, subdivision (a) provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . .” Although assault with a firearm and false imprisonment are separate offenses, Kurney and Blanche claim that they were “part of an indivisible course of conduct with a single objective” (robbery) , so that Kurney and Blanche could only be sentenced for assault with a firearm, as it is the more serious offense.



At both Kurney's and Blanche's sentencing hearings, the trial court concluded that the videotape showed that the false imprisonment and the assault with a weapon were discrete acts, explaining at Blanche's hearing "there is no merger under Penal Code section 654 for counts 3, 4, 5, and 6. The crimes were committed separately and not dependent on one another for completion. The surveillance video depicts a discrete act of pushing towards the ground for each of the two victims and then much thereafter was assaulted with a firearm. Also, the assault with a firearm was already completed and was not a necessary condition for the restraint of the victims in order to perfect the false imprisonment."

"Under section 654, a "course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]" [Citations] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]" (*People v. Andra* (2007) 156 Cal.App.4th 638, 640.) "The defendant's intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence. [Citation.] 'We review the court's determination of [a defendant's] "separate intents" for sufficient evidence in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*Id.* at pp. 640–641.)

We have reviewed the surveillance video which recorded the events in the Hot Box, and we conclude that the trial court's conclusion that section 654 does not apply is not supported by substantial evidence. The video shows that Blanche walked back to the front door and looked outside after Kurney jumped the counter. Blanche and Kurney's accomplice stopped Jane Doe from leaving the store when she tried to flee through the front door, pushing her to the floor. John Doe went face down on the floor by the front door with Jane Doe. Blanche walked toward the counter from the front door as the

accomplice closed the door, and on the way, Blanche pointed the gun down at John and Jane Doe.

The evidence shows that John and Jane Doe went to the floor (Jane Doe pushed down by the accomplice and John Doe, blocked from leaving, joining her), the accomplice closed the door, and Blanche nearly simultaneously pointed the gun down at them as he walked by. The two events were not separated by enough time for Blanche to reflect and decide to point his firearm at John and Jane Doe. The trial court's statement that the assault with a firearm was "already completed and was not a necessary condition for the restraint of the victims" reverses the sequence shown by the surveillance videotape, which shows that the assault with a firearm was an integral part of the false imprisonment.

*People v. Trotter* (1992) 7 Cal.App.4th 363 (*Trotter*) supports the conclusion that the trial court erred in imposing separate punishments. In *Trotter*, the defendant stole a taxicab and fired three gunshots at a police officer pursuing him on the freeway. The first two shots were separated by a minute; the second and third shots by seconds. (*Id.* at p. 366.) The defendant was convicted of three counts of assault on a peace officer with a firearm (among other counts), and the trial court imposed consecutive sentences for the first two assaults (the shots separated by a minute). The defendant challenged the consecutive sentences on appeal, arguing that the first two shots were incidental to the objective of avoiding apprehension by the police officer, and section 654 barred punishment for both. (*Ibid.*)

In affirming the consecutive sentences for the two assaults, the Court of Appeal concluded that each of the three shots was separately punishable. "Defendant's conduct became more egregious with each successive shot. Each shot posed a separate and distinct risk to [the officer] and nearby freeway drivers. . . . [¶] . . . Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable." (*Trotter, supra*, 7 Cal.App.4th at pp. 367–368.) The "few seconds" preceding the third shot "was thus time . . . for defendant to reflect and

consider his next action. . . . [¶] . . . [¶] . . . [E]ach shot evinced a separate intent to do violence.” (*Id.* at p. 368.)

Unlike the defendant’s separate shots in *Trotter*, Blanche’s pointing of the firearm at John and Jane Doe was not separated from the false imprisonment by a time allowing for reflection. The assault with a firearm did not “evince[] a separate intent to do violence” from the intent involved in false imprisonment. The trial court’s decision not to apply section 654 and the imposition of consecutive sentences on Kurney and Blanche was not supported by substantial evidence. Kurney and Blanche’s sentences on counts 5 and 6 must be stayed, along with the enhancements on those counts under section 12022, subdivision (a)(1). (See *People v. Guilford* (1984) 151 Cal.App.3d 406, 411.)<sup>4</sup>

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<sup>4</sup> We agree with Kurney’s contention, which the prosecution concedes, that the one-year terms imposed on Kurney and Blanche on the firearm enhancements to counts 5 and 6, pursuant to section 12022, subdivision (a)(1), should be four months rather than one year. (See §§ 1170.1 subd. (a), 1170.11.) Although Blanche does not raise this issue, it inures to his benefit. The stayed sentences on counts 5 and 6 must be corrected to reduce the one-year terms on section 12022, subdivision (a)(1) to four-month terms.

## **DISPOSITION**

As to both Kurney and Blanche, the section 12022.5, subdivision (a) and (d) enhancements connected to count 3 are stricken. The jury's "true" finding regarding section 12022.53, subdivision (b) on count 3 as to both Kurney and Blanche is also stricken. Kurney and Blanche's sentences on counts 5 and 6 are ordered stayed, including the enhancements under section 12022, subdivision (a)(1), and the one-year sentences on those enhancements are reduced to four months. The superior court is directed to prepare an amended abstract of judgment reflecting these modifications and to forward a copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.